No. 2799.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Yee Chung,
Appellant,
vs.
United States of America,
Appellee.

PETITION FOR REHEARING.

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Comes now the appellee in the above-entitled case and petitions this Honorable Court for a rehearing in the above-entitled matter, and, in support of said petition, shows to the court the following matters:

ARGUMENT.

In deciding this case, the lower court came to the conclusion that:

> "The whole question in the case, however, centers about a determination of the claim of the defendant that he is the individual named Yee Chung, who was adjudged to be rightfully in the United States by a commissioner of the United

States District Court of the District of Vermont, in the month of January, 1898, and this issue is the determinative one, because if it can be believed from the evidence that he is the individual mentioned in that proceeding, then it is impossible to discredit his claim that he is the son of Yee Kin Sing.

"If, however, his asserted claim of having been adjudged rightfully in the United States, in Vermont, as above referred to, be without foundation in the mind of the court, then his claim of being native-born falls to the ground, because the claimant has been completely discredited as a witness, and the order of deportation should be affirmed."

This was the way in which the attorneys for the Government viewed the matter also, as it was believed that if the appellant Yee Chung was shown to have falsely testified and to have presented false documents in support of his contention that he was the same Yee Chung discharged by the commissioner in Birmingham, Vermont, then it would naturally follow that the testimony produced by him on the other points must be viewed with discredit. The lower court decided that this appellant was not the same Yee Chung who was discharged by the commissioner in Vermont, and, having thus found the appellant to be false in that part of the testimony produced in his behalf, decided that the appellant had failed to establish his right to be in the United States to the court's satisfaction. (Chinese Exclusion Law; Amendment of May 5, 1892, section 3, 27 Stat., page 25.)

Upon the point of what amount of evidence should be produced to satisfy the court in a Chinese exclusion case, the court, in his opinion in the Yee Chung case, said:

> "I had occasion, in an oral opinion delivered in this court, late in January of last year, in the case of United States v. Jee Jan, to indicate my views as to the amount of evidence that ought to be produced in behalf of a person of Chinese descent, in one of these deportation cases, in order that the requirement of the statute that the court should be satisfied, might be had; and I see no reason to depart from the views there announced. The burden, I believe, is placed by the statute upon the defendant, and he must, by the evidence adduced in his behalf, "satisfy" the court, i. e., produce moral certainty or conviction (C. C. P. Sec. 1835) of the truthfulness of his claim. (186 U. S. 193.)"

It will thus be seen that the lower court cited his opinion in the Jee Jan case solely upon the amount of evidence that ought to be produced on behalf of a person of Chinese descent in a case arising under the exclusion laws, and did not cite the said Jee Jan case or refer to it in any particular upon the credibility of witnesses or the unreliability of Chinese testimony.

Counsel for appellee, in their brief filed in this court, set out at length the opinion of the lower court in the Jee Jan case, but did not set out the facts which led the lower court to express his opinion of Chinese testimony in the language excepted to by this court in its opinion in this case. This court quoted freely from the Jee Jan case upon the point of the credibility of Chinese testi-

mony, but we respectfully call this court's attention to the fact that the lower court did not impugn the Chinese testimony offered by appellant in this case, but, on the other hand, held that the United States proved that Yee Chung was not the same Yee Chung who was discharged by the commission in Vermont. Therefore, the remarks of the court in the Jee Jan case on the credibility of Chinese testimony does not apply in any manner to this case. Again, a court may be led to make remarks orally from the bench (and the Jee Jan opinion was rendered orally from the bench at the time the case was decided, and the copy of it set out in the brief of appellee in this case was taken from the reporter's notes and there is no opinion filed of record in the Jee Jan case) which the court would not desire to be published as a rule of law to apply to all cases, and, as a matter of fact, the Jee Jan case was an aggravated case involving fraud, and it is improbable that the lower court intended the words objected to by this court to apply in all cases and, certainly, his opinion as rendered in this case gives us no intimation that he discarded the Chinese testimony or refused to consider it or in any wise cast aspersion upon it.

But we would respectfully call this court's attention to the fact that through a long series of judicial decisions, statements and comments are found casting reflection upon Chinese testimony, to which cases we will hereafter more particularly allude, and Congress itself has seen fit to throw the gravest suspicions upon Chinese testimony by certain acts included in the different Chinese Exclusion Laws.

Let us consider briefly the history and development of the Chinese Exclusion Laws:

In this connection we cannot do better than to quote, somewhat at length, from the famous opinion of Justice Field in the Chinese Exclusion case, Chae Chan Ping v. United States, 130 U. S. 581: (Quoting from page 595):

> "In December, 1878, the convention which framed the present constitution of California, being in session, took this subject up, and memorialized Congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions; and praying Congress to take measures to prevent their further immigration. This memorial was presented to Congress in February, 1879.
>
> "So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific Coast and from private individuals, that Congress was impelled to act on the subject. Many persons, however, both in and out of Congress, were of the opinion that so long as the treaty remained unmodified, legislation restricting immigration would be a breach of faith with China. A statute was accordingly passed appropriating money to send

commissioners to China to act with our minister there in negotiating and concluding by treaty a settlement of such matters of interest between the two governments as might be confided to them. 21 Stat. 133, Ch. 88. Such commissioners were appointed, and, as the result of their negotiations, the supplementary treaty of November 17, 1880, was concluded and ratified in May of the following year. 22 Stat. 826. It declares in its first article that 'Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.' In its second article it declares that 'Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.'

"The government of China thus agreed that notwithstanding the stipulations of former treaties, the United States might regulate, limit, or suspend the coming of Chinese laborers, or their residence therein, without absolutely forbidding it, whenever in their opinion the interests of the country, or of any part of it, might require such action. Legislation for such regulation, limitation, or suspension was entrusted to the discretion of our Government, with the condition that it should only be such as might be necessary for that purpose, and that the immigrants should not be maltreated or abused. On the 6th day of May, 1882, an act of Congress was approved, to carry this supplementary treaty into effect. 22 Stat. 58, C. 126. It is entitled 'An act to execute certain treaty stipulations relating to Chinese.' Its first section declares that after ninety days from the passage of the act, and for the period of ten years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come, to remain within the United States. The second makes it a misdemeanor, punishable by fine, to which imprisonment may be added, for the master of any vessel knowingly to bring within the United States from a foreign country, and land, any Chinese laborer. The third provides that those two sections shall not apply to Chinese laborers who were in the United States November 17, 1880, or who should come within ninety days after the passage of the act. The fourth declares that, for the purpose of identifying the laborers who were here on the 17th of November, 1880, or who should come within the ninety days mentioned, and to furnish them with

'the proper evidence' of their right to go from and come to the United States, the 'collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house;' and each laborer thus departing shall be entitled to receive from the collector or his deputy, a certificate containing such particulars, corresponding with the registry, as may serve to identify him. 'The certificate herein provided for,' says the section, 'shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter.'

"The enforcement of this act with respect to laborers who were in the United States on November 17, 1880, was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath. [Italics ours.] This fact led to a desire for further legislation restricting the evidence receivable, and the amendatory act of July 5, 1884,

was accordingly passed. 23 Stat. 115, C. 220. The committee of the House of Representatives on foreign affairs, to whom the original bill was referred, in reporting it back, recommending its passage, *stated that there had been such manifold evasions, as well as attempted evasions, of the act of 1882, that it had failed to meet the demands which called it into existence.* Report in H. R. No. 164, 48th Cong. 1st Sess. *To obviate the difficulties attending its enforcement the amendatory act of 1884 declared that the certificate which the laborer must obtain 'shall be the only evidence permissible to establish his right of re-entry' into the United States.* (Italics ours.)

"This act was held by this court not to require the certificate from laborers who were in the United States on the 17th of November, 1880, who had departed out of the country before May 6, 1882, and remained out until after July 5, 1884. *Chew Heong v. United States,* 112 U. S. 536. The same difficulties and embarrassments continued with respect to the proof of their former residence. Parties were able to pass successfully the required examination as to their residence before November 17, 1880, who it was generally believed, had never visited our shores. To prevent the possibility of the policy of excluding Chinese laborers being evaded, the act of October 1, 1888, the validity of which is the subject of consideration in this case, was passed. It is entitled 'An act a supplement to an act entitled "An act to execute certain treaty stipulations relating to Chinese," approved the sixth day of May, eighteen hundred and eighty-two.' 25 Stat. 504, C. 1064. It is as follows:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.

"'Sec. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

"'Sec. 3. That all the duties prescribed, liabilities, penalties, and forfeitures imposed, and the powers conferred by the second, tenth, eleventh and twelfth sections of the act to which this is a supplement, are hereby extended and made applicable to the provisions of this act.

"'Sec. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed.

"'Approved October 1, 1888.'"

After this opinion was handed down by the Supreme Court, Congress determined that even yet the law did not meet the exigencies of the case and, on May 5, 1892, amended the Chinese Exclusion Law to require all Chinese laborers in the United States to register, section 6 of this amendment reading as follows:

"And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue, or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, *unless he shall establish clearly to the satisfaction of said judge* that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least *one credible white witness,* that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost." (Italics ours.)

and changed the rule of procedure to make it *incumbent upon the Chinese to establish his right to be in the United States,* section 3 reading:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act

> or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

It will thus be seen that Congress further recognized the inherent lack of reliability of Chinese testimony by thus further placing the burden upon a Chinese person to prove his right to be in the United States to the satisfaction of the justice, judge or commission and, in certain cases where a Chinese had failed to register under section 6 he must prove by at least one credible white witness (in 1893 changed to read "one credible witness other than Chinese") the fact that he was resident in the United States at the time of the registration, further showing that Congress absolutely refused to recognize Chinese testimony in matters of vital interest to the Chinese as a race. In 1893 Congress further amended section 2 of the act to make it read, in part, as follows:

> "Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, *he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States* * * *." (Italics ours.)

Here again Congress refused to recognize Chinese testimony as on a par with other testimony. On this point, Moore on Facts, Vol. 2, par. 1023, says:

"CHINESE.—In Chinese exclusion cases the testimony of Chinese witnesses, unknown and coming from a distance—especially that of foreigners—is regarded as more or less weak. The tribunal before which they speak knows little of them, and they care little for it, and may have no respect for the laws of this country. They have little to fear from having their falsehoods exposed, as there is little danger of conviction of perjury, and they lose nothing in reputation among their fellows."

The constitutionality of the acts of Congress in thus discriminating against Chinese testimony was upheld in the case of Fong Yue Ting v. United States, 149 U. S. 698, wherein the court said (quoting from page 729 of the opinion):

"The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, 'by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act,' is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Ogden v. Saunders,* 12 Wheat. 213, 262, 349; *Pillow v. Roberts,* 13 How. 472, 476; *Cliquot's Champagne,* 3 Wall. 114, 143; *Ex parte Fisk,* 113 U. S. 713, 721; *Holmes v. Hunt,* 122 Mass. 505, 516-519. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. Rev. Stat., Secs. 858, 1977. The reason for requiring a Chinese alien, claiming the privilege of remaining

> in the United States, to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,' may have been the experience of Congress, mentioned by Mr. Justice Field in *Chae Chan Ping's case,* that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.' 130 U. S. 598. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.' Acts of March 22, 1816, c. 32, Sec. 2, 3 Stat. 259; May 24, 1828, c. 116, Sec. 2, 4 Stat. 311; Rev. Stat., Sec. 2165, cl. 6; 2 Kent Com. 65."

This language of the Supreme Court in the Fong Yue Ting case was cited with approval by the same court in a later case: Li Sing v. United States, 180 U. S. 494.

In the case of Quock Ting v. United States, 140 U. S. 417, the court held that uncontradicted evidence of interested witnesses about an improbable fact does not require judgment to be rendered accordingly. In this case the Supreme Court upheld the order of the

lower court ordering the appellant (a Chinese) deported although appellant himself testified to being born in San Francisco, his father testified he was born in San Francisco, and certain book entries were introduced to corroborate their statements, and no witness was called on behalf of the Government to contradict their statements.

In the case of Low Foon Yin v. United States *et al.*, 145 Federal 791, this court (Judge Ross writing the opinion) quoted with approval the following language from the case of United States v. Wong Dep Ken (57 Fed. 206):

> "'No one questions the power of Congress to prohibit the coming into this country of any class of foreigners deemed prejudicial to the interests of our people. Against the coming into the country of Chinese laborers, Congress has been legislating for years. The reason for such legislation is an old story, and need not be repeated. But, notwithstanding the enactments upon the subject, *the laws have been evaded in many ways. By false testimony and concocted evidence the courts have been imposed upon in cases almost without number, and by sea and land the prohibited class in large numbers have been smuggled into the country in one way or another.* (Italics ours.) To prevent all of this, and give effect to its laws upon the subject, as far as possible, Congress deemed it wise by the provision in question to put the burden of proof of his lawful right to remain in the United States on the Chinese person or person of Chinese descent charged with being unlawfully within their borders. To those not residents of and not familiar with the Pacific slope, and not

so much subject to the evils intended to be guarded against by the exclusion acts, "the lines laid down for their enforcement may," as appropriately and well said by Judge Severens in the case of Sing Lee (D. C.), 54 Fed. 334, "seem hard; and because such summary dealings with the rights of persons are out of the common order to which we are accustomed, and are liable to produce injustice in many cases on account of their summary expedition and the presumption against the prisoners, they may seem severe; but, if the power resides in Congress to enact such provisions, the discretion whether it will do so rests in the law-making power, and the courts must presume it was exercised upon sufficient reasons." In respect to the provision of the Geary Act putting the burden of proof on those coming within the class thus interdicted, I agree with the provisions of the Constitution of the United States, but, for the reasons given by him, and in view of the circumstances already referred to and of others that may be suggested, that the provision in question is not unreasonable, he says:

" ' "The person brought before the commissioner is one of a class which, by the terms of the statute, is obnoxious to its operation. That must appear before the general jurisdiction can be exercised, and, since, generally, that class is interdicted, he can only escape the common lot upon its appearing that he is now within the general condemnation. The means of showing this are presumably in his own control. It would be extremely inconvenient, and probably in most cases impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule

of evidence which devolves the burden on the party who presumably has the best means of proving the fact; but, whatever the rule which by the common law would be applicable to trials, it cannot be affirmed that in such conditions the legislature cannot prescribe such a rule of evidence." ' "

Thus this court has recognized the unreliability of Chinese testimony in certain cases.

In the case of United States v. Lee Huen and fourteen others, 118 Federal 442, Judge Ray said, in part, as follows:

"So, too, it is common knowledge that enslaved peoples develop an inordinate propensity for lying, and this is characteristic of most oriental nations. This comes largely from their being subject to the caprice and exactions of their masters or superiors, and, having no sense of moral responsibility to them, they come to regard lying to them as no sin, and an habitual disregard of the truth is thus engendered. (Italics ours.) See 1 Tayl. Ev. (Ed. 1897, Am. Notes), Secs. 53, 56. See, also, Chae Chan Ping v. U. S., 730, 13 Sup. Ct. 598, 9 Sup. Ct. 623, 32 L. Ed. 1068, and 149 U. S. 730, 13 Sup. Ct. 1016, 37 L. Ed. 905. *Hence in all these Chinese exclusion cases the testimony of Chinese witnesses, unknown and coming from a distance,—especially that of foreigners,—may be regarded as more or less weak; and, when contradicted or really impeached in any of the modes suggested and recognized by our law, the commissioner is justified in regarding such testimony, standing alone, as insufficient to convince the judicial mind. This conclusion must not be reached arbitrarily or capriciously or from prejudice, but from conviction*

that the case is not made out; and in such cases the appellate court or judge is not justified in reversing the findings of the tribunal which had the opportunity of observing the witness, and noting his manner and sincerity or want of sincerity in giving testimony. It is true that an intelligent and experienced judge often detects the falsehood of a witness who tells a story which, reduced to writing, reads smooth as the Psalms of David." (Italics ours.)

We also call the court's attention to the following cases in which the courts have decided that the burden thrown upon a Chinese in exclusion cases was not met by the testimony offered, in most of which cases the testimony was that of Chinese witnesses, showing that the courts, as a general rule, look with disfavor upon Chinese testimony alone, and that they have seldom been "satisfied" of the alien's right to remain in the United States where such right rested solely upon Chinese testimony.

Arnk Bing *et al.* v. U. S., 238 Fed. 348;
U. S. v. Hen Lee, 236 Fed. 794;
U. S. v. Williams, 83 Fed. 997;
Ex parte Chin Him *et al.*, 227 Fed. 131;
U. S. v. Leung Sam *et al.*, 114 Fed. 702;
U. S. v. Moy Toom, 224 Fed. 521;
Wong Woo v. U. S., 240 Fed. 673;
In re Louie You, 97 Fed. 580;
In re Jew Wong Loy, 91 Fed. 240;
In re Hui Gnow Doy, 91 Fed. 1006;
Wong Chun v. U. S., 170 Fed. 182;
In re Ho Quai Sin, 84 Fed. 310;
Lee Yuen Sue v. U. S., 146 Fed. 670;
Yee Ging v. U. S., 190 Fed. 270.

We therefore respectfully submit that there are cases in which it is eminently proper to reject Chinese testimony, and in those cases where Chinese testimony is accepted, it is proper to view it with more than ordinary scrutiny, by reason of the decisions above cited, and the attitude of Congress in its laws relating to Chinese testimony.

We are constrained to believe that had the government not placed in its brief that portion of the opinion of the lower court in the Jee Jan case, to which this court took exception, this court would not have arrived at the same conclusion as it did in this case, and we therefore respectfully submit that the government should be granted a rehearing.

In our brief filed in this case, we did not cite all of the authorities upon the question that where the commissioner and lower court heard the witnesses and ordered a Chinese person deported, the upper court would not overturn their findings of fact. In addition to the cases cited there, we would respectfully call the court's attention to the following cases upon that point:

United States v. Leung Sam, 114 Fed. 702;
Li Sing v. United States, 180 U. S. 486;
Lee Yu v. United States, 133 Fed. 45;
Hong Yon v. United States, 164 Fed. 330;
Wong Chun v. United States, 170 Fed. 182;
Jew Lee v. United States, 237 Fed. 1013;
Arnk Bing v. United States, 238 Fed. 348.

After a careful reading of these cases above cited, and the authorities therein referred to, we do not be-

lieve that this court would have disturbed the findings of fact of the lower court and of the commissioner if it had considered this case separate and apart from the remarks of the lower court in the Jee Jan case, and if this court was convinced that the lower court acted without prejudice in the matter, and we believe this to be true beyond peradventure of doubt. We believe that the explanation hereinbefore made concerning the Jee Jan case conclusively shows that the lower court did not intend to reject the Chinese testimony in this case *in toto* by reason of its being Chinese testimony, and that in fact he did not so do, but that after a fair and impartial consideration of all of the evidence, he was not satisfied to the degree mentioned in the statute of the claim of Yee Chung that he was the same Yee Chung who was discharged by the commissioner in Vermont, and, basing his opinion in the case upon his conclusions on that point, rejected the other testimony in the case as irreconcilable with his findings of fact on that point.

We would, finally, show to the court that the appellant in this case stipulated with the appellee that the case might be submitted to this court upon written briefs without oral argument, and, on October 6, 1916, an order was entered in this court to that effect. Thereafter, appellant filed a reply brief to the brief of appellee although there is no rule of this court or precedent for such procedure without the consent of the court, which, in this case, if granted, was never called to our attention.

Appellant's reply brief deals solely with the lower court's opinion in the Jee Jan case, and appellee has

never until this time had opportunity to answer the reply brief of appellant and to make explanation of those matters therein referred to. Had there been an oral argument, we believe that we would have been able to have successfully rebutted any presumption of prejudice arising in this case by reason of the lower court's opinion in the Jee Jan case.

As to the facts as we view them in this case, we would again respectfully call the court's attention to our brief heretofore filed in this case.

We would therefore most earnestly submit that the government should be granted a rehearing in this case.

Respectfully submitted,

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